S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re BYRNE Estate.

NORTHERN TRUST BANK, F.S.B., Personal Representative of the Estate of ROBERT F. BYRNE and Trustee of the ROBERT F. BYRNE Trust, RFB PROPERTIES, INC., RFB – BLOOMFIELD, L.L.C., R. F. BYRNE COMPANY., BYRNE AVIATION, L.L.C., and RFB – AURELIUS, L.L.C., Plaintiffs-Appellants,	UNPUBLISHED March 25, 2014
v	No. 307641 Oakland Probate Court LC No. 2006-306903-CZ
JOHN BECKER, Personal Representative of the Estate of MARLENE R. BILLS, Defendant-Appellee.	

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this dispute concerning the handling of decedent Robert F. Byrne's business and estate assets, both prior to and after his death, plaintiffs Northern Trust Bank, F.S.B., as personal representative of the Estate of Robert F. Byrne and trustee of the Robert F. Byrne Trust, RFB Properties, Inc., RFB–Bloomfield, L.L.C., R. F. Byrne Company, Byrne Aviation, L.L.C., and RFB–Aurelius L.L.C., appeal of right the trial court's orders resolving their claims in favor of defendant Marlene R. Bills after a combined bench and jury trial.[1] Because we conclude there were no errors warranting relief, we affirm.

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[1] Bills died after the trial court issued its final order. John Becker, the personal representative of Bills' estate, has been substituted in her place as the party defendant.

I. BASIC FACTS

During his lifetime, Byrne accumulated substantial wealth through his investments in beer distributorships, real estate, and business ventures.

Byrne employed Bills as his long-time business manager. Although the nature of his relationship with Bills was disputed, there was evidence that Byrne viewed Bills as more than an ordinary employee, and in fact considered her a close personal friend. Bills and Byrne were apparently involved in an intimate relationship that ended in the 1970s. Even after the relationship ended, Byrne retained Bills as the manager for his business ventures and delegated substantial authority over his finances to her. The parties agree that Bills had had a power of attorney to act on Byrne's behalf since at least the 1990s.

The evidence showed that Byrne remained close to Bills over the years—they often travelled together and he bought her expensive gifts—but he also continued to have relationships with other women for whom he also bought expensive items. Plaintiffs' theory was that Bills was jealous of Byrne's relationships with other women and had hoped that he would someday marry her. Bills' witnesses contradicted this position; they testified that Byrne and Bills were deeply devoted to each other and that Bills accepted Byrne's roving nature. There was also evidence that Byrne was close with Bills' daughter, Cheryl Becker, Cheryl's husband, John Becker, and their daughter, Adrienne Becker.

Byrne had a difficult relationship with his daughter, Kathleen Henry, but he helped her and her husband buy their own beer distributorship. Before 2001, Byrne's trust and will designated Bills as a residual beneficiary. In 2001, Byrne reconciled with Henry and Byrne revised his estate plan to name Henry as the residual beneficiary. Byrne's trust directed that Bills should receive the residence in Lake Angelus that he bought for Bills' use in the late 1990s. The trust originally provided that the transfer was subject to estate tax, but Byrne amended the trust in 2004 to leave the property to Bills free of estate tax.

In 2002, Byrne suffered a fall that led to brain bleeds, which required surgery. Byrne had a neuropsychological evaluation in October 2002, which indicated that he had dementia. The evaluation recommended that he consider a guardianship or conservatorship, but Henry never followed up, explaining that she was unwilling to offend her father's pride.

From the time of his surgery to his death from cancer in 2005, Byrne participated in several financial transactions that benefitted Bills. Since 1987, Bills and Henry had been joint owners of Byrne's "general" checking account. Bills issued several checks to herself from this account, including a check for more than $200,000 that she used to purchase a condominium in Troy.

Byrne and Bills opened two joint checking accounts with Comerica Bank in 2004. Bills closed the previous general checking account and deposited the funds from that account into one of the new accounts. In 2005, Byrne and Bills opened a joint brokerage account with Comerica Securities. Byrne deposited $850,000 into this account. During this period, Byrne also was involved in financial transactions that did not benefit Bills, and he continued to meet twice annually with his estate planning lawyer, Leonard Prekel, to review and update his estate plan.

Byrne was diagnosed with esophageal cancer and died shortly thereafter in December 2005. On the day Byrne died, Bills issued two checks to herself totaling $22,000 from the joint Comerica accounts. Northern Trust, as successor trustee and personal representative of the Byrne's estate, terminated Bills' employment with Byrne's businesses. In late December 2005, Bills closed the two joint checking accounts and the Comerica Securities account and withdrew the remaining funds.

Plaintiffs sued Bills on various grounds to recover the funds that Bills allegedly misappropriated from Byrne's accounts. The suit proceeded to a mixed jury and bench trial. The jury rejected plaintiffs' claim that Bills exerted undue influence on Byrne, converted funds, and was unjustly enriched. The jury did find that Bills breached her fiduciary duty to Byrne, made unauthorized appropriations, and fraudulently concealed assets. However, the trial court later granted Bills' motion for a directed verdict and judgment notwithstanding the verdict (JNOV) on those claims. Similarly, although the trial court had granted partial judgment in plaintiffs' favor on their equitable claim for an accounting, it vacated that judgment and entered a judgment of no cause of action on the accounting claim.

This appeal followed.

II. DIRECTED VERDICT AND JNOV

A. STANDARD OF REVIEW

Plaintiffs first argue that the trial court erred when it granted Bills' postjudgment motion for a directed verdict and JNOV on the breach of fiduciary duty and taking funds without entitlement claim. We review de novo a trial court's decision granting or denying a motion for a directed verdict. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Chouman*, 293 Mich App at 441 (quotation marks and citation omitted). This Court also reviews de novo a trial court's decision on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). The reviewing court must consider the evidence and draw legitimate inferences in the light most favorable to the nonmoving party, to determine if the evidence fails to establish a claim as a matter of law. *Id.*

B. ANALYSIS

Plaintiffs did not set forth separate claims for each disputed transaction; instead, they alleged various theories of relief: breach of fiduciary duty, undue influence, conversion, unauthorized appropriations, unjust enrichment, and fraudulent concealment. The individual theories pertained to one or more disputed transactions. The jury rejected plaintiffs' claims of undue influence, conversion, and unjust enrichment. Although the jury returned a verdict in favor of plaintiffs with respect to the breach of fiduciary duty, unauthorized appropriation, as well as the fraudulent concealment pertaining to the Troy condominium, the trial court later granted Bills' motions for a directed verdict and JNOV with respect to those claims. On appeal, plaintiffs contend that the trial court failed to defer to the jury's factual findings, disregarded evidence, and failed to apply correct legal principles in analyzing plaintiffs' specific theories of relief.

1. BREACH OF FIDUCIARY DUTY

"Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when a confidence has been reposed and betrayed." *In re Duane V Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007) (quotation marks and citation omitted), rejected not in relevant part 480 Mich 915 (2007). "Under common-law agency principles, a fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of his agency." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 49; 698 NW2d 900 (2005) (quotation marks and citation omitted).

Plaintiffs contend that they offered sufficient evidence to support the jury's finding that Bills had a fiduciary duty as a corporate officer and as Byrne's attorney-in-fact. They also argue that there was adequate evidence to support the finding that she breached her fiduciary duty by causing the creation of joint accounts when Byrne was not competent to manage his finances, depositing and comingling rental checks, loan payments, and other company funds in the joint accounts, closing the original general account to deprive Henry of her interest, withdrawing funds for personal use, and using funds after Byrne's death when she still owed a duty to his companies. Plaintiffs contend that the trial court improperly emphasized Bills' rights as a joint account holder while disregarding evidence that the accounts were created and funded as a result of her self-dealing and disloyalty. Plaintiffs also argue that the trial court improperly added bad faith as an element to a claim for breach of fiduciary duty.

Plaintiffs presented no direct evidence that Bills was behind the creation of the two joint Comerica Bank accounts in 2004. Plaintiffs also presented no evidence that she made deposits into and withdrawals from the joint accounts without Byrne's knowledge or consent. Rather, plaintiffs merely speculated that Bills must have been behind the creation of the accounts and must have misused her authority because she had the opportunity and motive to do so. Plaintiffs' claim depended heavily on the theory that Byrne's mental state had so deteriorated that he could not manage his affairs by October 2002, which gave Bills the opportunity to profit at his expense.

The evidence, however, did not establish that Byrne's brain injury left him unable to understand what was happening when he joined with Bills to create the two joint Comerica Bank checking accounts in 2004. The author of the neuropsychological report did recommend that Byrne *consider* the need for a guardian or conservator because his "deficits" were "likely to impair his judgment", but the recommendations were never pursued and the nature and extent of his "deficits" were not further developed at trial. Henry testified generally that her father's memory had declined and she related incidents in which he became confused while driving. But her testimony did not support an inference that Byrne had lost his ability to manage or understand his finances.

In contrast to the lack of evidence permitting an inference that Byrne was unable to manage his finances, there was significant evidence that he was fully capable of managing his finances during the relevant period. Byrne's estate lawyer, Prekel, testified that he met with Byrne twice a year to update his estate plan. During these visits, he did not observe that Byrne had any difficulty participating in the process. Moreover, plaintiffs' own evidence established that Byrne made several financial decisions during this period which were not influenced by Bills. He wrote checks to both Henry and Bills to buy motor vehicles. He also made Henry the beneficiary of his Fidelity retirement account. He further provided an inheritance for another lady-friend, Barbara Mazer. Because plaintiffs failed to establish a question of fact as to whether Byrne was incapable of managing his affairs, plaintiffs could not establish that Bills breached a fiduciary duty by taking advantage of his weakened state.

Notwithstanding the undisputed evidence that Byrne retained the ability to make financial decisions, plaintiffs contend that, as a fiduciary, Bills was strictly prohibited from using Byrne's assets to her own advantage. Plaintiffs argue that the trial court erred by requiring them to prove that Bills conducted these transactions fraudulently or in bad faith. Plaintiffs also argue that Bills' status as a fiduciary, when considered with the evidence that Byrne established the joint accounts for his own convenience, overrode any rights Bills may have had as a joint owner.

In its opinion and order granting Bills' motion for a directed verdict and JNOV, the trial court addressed the elements required to prove a breach of fiduciary duty and emphasized that plaintiffs had to prove more than that Bills benefited from the transaction:

> In order to recover on their claim of breach of fiduciary duty, plaintiffs have the burden of proving all of the following:
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> 1. Marlene Bills had a fiduciary relationship with Robert Byrne or his companies.
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> 2. Marlene Bills breached one or more of her fiduciary duties.
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> 3. Robert Byrne or his Estate or his companies suffered damages as a proximate result of that breach.
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> The courts have imposed on fiduciaries duties of honesty, loyalty, restraint from self-interest and good faith. *In re Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988). "[T]ransactions involving self-dealing should be closely scrutinized . . . to see whether the trustee's actions indicate[] any fraud, bad faith or overreaching on the part of the trustee. *Green*, 172 Mich App at 314. "Bad faith is not a specific act in itself, but defines the character or quality of a person's actions. *Green*, 172 Mich App at 314. "[B]ad faith has been defined as 'arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.'" *Green*, 172 Mich App at 314.
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> In light of these standards, the Court finds that Plaintiffs must do more than simply present the fact of a transaction and then argue that it is self-dealing, because Bills is a fiduciary and gained a benefit from it; or argue that Bills acted

> in bad faith, because Byrne had been diagnosed with dementia; or argue that Bills failed to disclose the truth about a transaction, because there is no evidence that Byrne knew about the transaction. The Court finds that there is no evidence from which a jury could reasonably conclude that any of the subject transactions were the result of fraud, bad faith or overreaching.

The trial court plainly relied on the fact that proof of self-dealing was not, by itself, sufficient to prove breach of fiduciary duty. The trial court relied on *In re Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988), in which this Court held that the fiduciary duties imposed upon a trustee are "honesty, loyalty, restraint from self-interest and good faith." This Court noted that "the liability of the trustee may be limited by the terms of the trust instrument." *Id.* This Court stated that the trustees' "liability for error, negligence, mistake of judgment, act or omission as trustees of the charitable trust was limited to actions done in bad faith . . . consistent with the common-law principle that trustees may not be liable for mere mistakes or errors of judgment where they have acted in good faith and within the limits of the law and of the trust." *Id.* at 314.

Plaintiffs contend that the bad-faith requirement in *In re Green Charitable Trust* arose from an "exculpatory clause" specific to that trust, and is not a universal requirement applying generally to claims for breach of fiduciary duty. This Court stated that "[a]n exculpatory clause generally is not considered to reduce or enlarge the standard of care required of the trustee in administering the trust, but acts to relieve the trustee of personal liability under the stated circumstances." *Id.* at 314. Plaintiffs interpret this Court's decision in *In re Green Charitable Trust* as supporting a general standard of breach of fiduciary duty that does not require evidence of bad faith, subject to the recognition that a trust instrument may include a bad-faith requirement to trigger the trustees' liability.

We conclude that the trial court's inclusion of a bad faith or fraud element, even if error, would not be dispositive. The trial court ultimately determined that plaintiffs could not establish that Bills breached her fiduciary duty by withdrawing funds from the joint accounts because the evidence clearly established that Byrne set up the joint accounts knowing that Bills could legally use the funds as a co-owner. That is, the trial court ultimately directed a verdict in Bills' favor because plaintiffs failed to offer evidence that Bills did not have the authority to make the disputed transactions.

Citing *Mineau v Boisclair*, 323 Mich 64; 34 NW2d 556 (1948), plaintiffs contend that whether Bills wrongfully withdrew funds from a joint bank account was a question for the jury. Specifically, they argue that the presumption of Bills' joint ownership of the funds in the joint accounts was rebutted by evidence that the accounts were merely convenience accounts. In *Mineau*, the administrator of the decedent's estate sued the defendant for a sum of money that the defendant withdrew after the decedent's death from an account jointly held by the defendant and the decedent. *Id.* at 67-68. The Supreme Court held that the question whether the defendant wrongfully withdrew money from the joint account was properly submitted to the jury because the plaintiff presented evidence to rebut the prima facie evidence that the joint account was created with the intention of vesting title in the survivor. The evidence consisted of testimony by two witnesses, the plaintiff and her daughter, that the "deposit in the bank was made in the joint names of [the decedent] and defendant solely as a matter of convenience in the withdrawal of money from the account." *Id.* at 70.

In this case, however, none of plaintiffs' witnesses testified that they had any knowledge that Byrne had set up the joint accounts with Bills solely for purposes of convenience. Henry and Pogue testified that Byrne delegated his business to Bills to leave him free for other pursuits, but this does not explain why he opted to make Bills a joint holder or beneficiary on the accounts when he could simply have made her an authorized signer. No one testified that Byrne ever expressed that the joint status was merely for convenience. Henry, Prekel, and Gormely testified that the joint accounts with Bills were inconsistent with Byrne's estate plain; specifically his substitution of Henry for Bills as the residual beneficiary, but Henry and Prekel also admitted that Byrne generously spent money on vacations and other gifts to Bills. And Gormely stated that he had no first-hand knowledge of Byrne's intentions. His knowledge came only from the estate planning documents themselves or from Henry and Prekel.

Because there was no evidence that Byrne lacked the capacity to establish the accounts and no evidence that he established the accounts with Bills as a joint holder or beneficiary for convenience alone, the trial court properly concluded that the undisputed evidence gave Bills the right to conduct the transactions that she did. That is, the undisputed evidence established that Byrne authorized Bills to use the funds from the accounts. Therefore, under these facts, the evidence that Bills acted for her own benefit was not enough to establish that her acts breached any duty that she might have owed to Byrne.

Plaintiffs additionally argue that the trial court erred when it determined that the presumption provided under MCL 487.703 applied to the facts. The Legislature provided that, when a person deposits funds into an account that he or she holds jointly with another person with rights of survivorship, there is a presumption that the depositor intends to vest title in the deposit to the joint account holder:

> The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors. [*Id.*]

Plaintiffs contend that the statutory presumption does not apply here because the word "survivor" does not appear in the two Comerica accounts created in 2004. Plaintiffs cite *Leib v Genesee Merchants Bank & Trust Co*, 371 Mich 89; 123 NW2d 140 (1963), in support of their contention that the account must have the word "survivor" in order to be an account with rights of survivorship. In that case, an uncle and nephew opened a joint checking account with the defendant bank. *Id.* at 90. After the uncle died, the nephew withdrew the funds, closed the account, and deposited the funds into a joint account he held with his wife. *Id.* at 91. The administrator of the uncle's estate sued the bank for breach of depository agreement and sued the nephew for conversion. *Id.* The trial court dismissed the counts against the bank, but entered judgment against the nephew. *Id.* at 91-92. The trial court believed that the bank had a duty "to respond to the [nephew's] signature which commands payment" and that "[t]he incident of death did not alter the situation." *Id.* at 92.

On appeal, the Supreme Court criticized the trial court for implicitly holding "that every joint account carries with it the right of survivorship." *Id.* The Court noted that, under MCL 487.703, the Legislature established two criteria that must be met before the presumption will arise: "First, a deposit must be made by a person in the name of the depositor, '*or*' any other person. This was done in the instant case. The correlative requirement is that the deposit be in a form to 'be paid to either *or the survivor of them*.'" *Id.* at 93. The Court concluded that because the document did not include the "or the survivor of either" language, there was no presumption favoring survivorship. *Id.* at 93-94.

However, the Court's analysis did not end there. After concluding that the statutory requirements were not met, the Court "next inquire[d] whether there was anything else in the instrument itself or in the circumstances surrounding the creation of the joint account which would afford any indication of the intent of the party or parties creating it." *Id.* at 94. The Court explained: "For, as in the case where the requisite form is used, a presumption to vest title is established, without the words the intent of the parties can be founded upon other admissible evidence." *Id.* The Court noted, however, that "[t]he record here is barren of indication" of the uncle's intent. *Id.* The Court concluded that, absent the requisite language regarding "right of survivorship" or other evidence of the uncle's intent, the account was not payable to the nephew on the uncle's death. *Id.* at 95.

The trial court discussed *Leib*, but concluded that Byrne "intended to create a joint account with rights of survivorship." We agree that, by designating Bills as the "beneficiary" in one of the account agreements, Byrne expressed a clear intent to convey the funds to Bills after his death. And Julie Quattro, an employee of Comerica Bank, confirmed that the beneficiary of an account receives the funds "if the primary account holder was not there." With regard to the other account, the documents showed that the account documents included the requisite "right of survivorship" language; therefore the statutory presumption applies. Plaintiffs argue, however, that the presumption was rebutted by evidence that the account was actually a convenience account.

Plaintiffs offered in support of this argument Henry's testimony that she understood that she was a joint account holder for her father's convenience, and that she had no right to the funds. They rely on *Jacques v Jacques*, 352 Mich 127; 89 NW2d 451 (1958), in which the plaintiff, John Jacques, alleged that his brother and sister-in-law, Raphael and Jane Jacques, had a duty to account, as constructive trustees, for funds that Jane withdrew from the decedent's bank account. The decedent originally opened the account, and later added Jane Jacques as a joint holder. *Id.* at 128. The trial court dismissed the plaintiffs' complaint pursuant to the statutory presumption of survivorship in a joint bank account. *Id.* at 129. On appeal, the plaintiff argued that he presented sufficient evidence to rebut the statutory presumption. *Id.* The plaintiff argued that the bank account was made joint only for the decedent's convenience, and that the account therefore was an asset belonging to the decedent's estate. *Id.* at 130.

The Supreme Court reviewed the statutory presumption and noted that it applies except when there is evidence of fraud or undue influence. *Id.* at 135-136. The Court rejected the plaintiffs' argument that the presumption "disappears" when the opposing party presents evidence to rebut it:

> The logical effect of such a rule would be, in the event of any evidence contrary to an intention to vest title in a survivor, to force the survivor to prove his title to the bank account as if the statute had never been passed, and in accordance with the common-law rules pertaining to gifts *inter vivos*.
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> We do not read the statute this way. Nor do we think Michigan's case law can properly be interpreted as appellant urges. As noted, this statute validates a new method of vesting title to funds. It makes the mere creation of the joint account with the use of words 'right of survivorship' prima facie evidence of intention to vest title. [*Id.* at 135-136.]

Moreover, the Court stated that evidence that the decedent may have placed his daughter-in-law on the account in part for convenience, that evidence "was not necessarily inconsistent with decedent's expressed intention of creating survivorship rights" in his daughter-in-law. *Id.* at 138. Thus, *Jacques* actually supports Bills' argument that Byrne's creation of the joint accounts presumptively established joint ownership.

Plaintiffs also argue that evidence that Bills had an undue influence on Byrne rebutted the presumption of joint ownership in the accounts created in 2004. However, the jury found that Bills did not exert undue influence and plaintiffs have not challenged that finding on appeal.

Finally, plaintiffs contend that there was a question of fact as to whether Bills breached her fiduciary duty not only when she withdrew funds from the joint accounts, but also when she deposited Byrne's business funds into the accounts. Plaintiffs contend that the trial court improperly made a finding of fact to the contrary.

The trial court acknowledged Gormely's testimony that he and other Northern Trust employees reviewed four years' worth of financial records and hired a forensic accounting firm to analyze purported irregularities in the financial records. As the court observed, however, plaintiffs failed to provide evidence of the various underlying transactions and Gormely was not qualified as an expert in forensic accounting. Plaintiffs admitted records for only two of the joint checking accounts at issue in this case, Comerica Account Nos. ****48632 and ****74557, and presented records only for the years 2002-2005 for Account No. ****48632, even though Bills had been a joint owner of the account since at least 1987. Accordingly, the trial court did not err when it determined that there were no facts to support Gormely's belief that Bills mishandled or misappropriated funds. Further, if Gormely's opinion is credited, proof that Bills deposited funds that came from Byrne or his businesses is not sufficient to prove breach of fiduciary duty. The accounts in question were not solely held by Bills, but by Byrne and Bills. Byrne had equal access to the accounts and could have withdrawn all funds at any time.

Plaintiffs contend that defendant's conduct with the joint accounts is similar to the conduct of the decedent's attorney-in-fact in *VanderWall v Midkiff*, 166 Mich App 668; 421 NW2d 263 (1988). In *VanderWall*, this Court held that the plaintiff offered sufficient evidence to establish a jury question with regard to whether the attorney-in-fact acted without the principal's authority in withdrawing funds from an account pursuant to her power-of-attorney. *Id.* at 678. However, the attorney-in-fact in *VanderWall* was not a joint holder of the allegedly mishandled account.

Notwithstanding plaintiffs' attempts to undermine the legitimacy of the joint bank accounts, the undisputed evidence showed that Byrne opened the joint accounts with Bills and made her the beneficiary of the accounts, rather than utilizing other means that would have allowed her access to the funds without giving her ownership rights. Plaintiffs failed to present evidence that the accounts were created without Byrne's knowledge and consent, or prove that their creation was a result of undue influence. Accordingly, the trial court did not err when it directed a verdict or JNOV with respect to this claim.

2. TAKING FUNDS WITHOUT ENTITLEMENT

Plaintiffs argue that the trial court erred in granting Bills a directed verdict and JNOV on their claim that she removed funds from accounts to which she was not entitled. We previously addressed the issue whether the trial court properly applied the statutory presumption of joint ownership under MCL 487.703. For purposes of this issue, we note that in certain situations, undue influence will be presumed. A presumption of undue influence arises upon a showing that (1) there existed a confidential or fiduciary relationship between a grantor and a fiduciary, (2) the fiduciary or an interest that he represented benefited from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in the transaction. *In re Karmey Estate*, 468 Mich 68, 73; 658 NW2d 796 (2003), citing *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). Once this presumption is created, the burden of going forward with contrary evidence shifts to the person contesting the claim of undue influence. *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985). However, the burden of persuasion remains with the contestant. *Id.* As previously indicated, the jury resolved the issue of undue influence in favor of defendant. Evidence that Byrne gave substantial monetary and other gifts to Bills and other female friends, that he competently managed his transactions after his illness, and that he assured John Becker that he would provide for Bills financially was sufficient to rebut any presumption of undue influence.

Plaintiffs nevertheless argue that there was overwhelming evidence that Byrne did not intend to convey the funds in his accounts to Bills. Plaintiffs cite Byrne's discussions with Prekel regarding the reservation of liquid assets to pay the estate tax, and evidence that Byrne was previously willing to leave Bills the Lake Angelus house subject to the estate tax, despite Prekel's warning that she would not have sufficient funds to pay the tax. Plaintiffs also reiterate that Byrne was mentally incompetent. Again, however, the question of undue influence was presented to the jury, which resolved the issue in Bills' favor. The account agreements naming her as the beneficiary of the accounts conferred on her the absolute right to withdraw the funds. Accordingly, the trial court properly granted defendant a directed verdict and JNOV with respect to this claim.

3. FRAUDULENT CONCEALMENT

Plaintiffs next argue that the trial court erred in vacating the jury's verdict on their claim that Bills fraudulently concealed that the Troy condominium was titled in her name rather than Byrne's name. Fraudulent concealment is not a claim in itself, but only a means of tolling the statutory period of limitations. See MCL 600.5855. Therefore, even if Bills fraudulently concealed her ownership interest in the condominium, that by itself would not entitle plaintiffs to any relief.

4. ACCOUNTING

Plaintiffs also maintain that the trial court erred in reversing its own decision with regard to Bills' duty to account for the post-death withdrawal of funds from joint accounts. In a bench trial, the trial court is the finder of fact and determines the weight and credibility of the evidence. *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). "When a judge sits as the trier of fact, his verdict is presumed to be the result of a correct application of the law to the evidence presented." *People v Beard*, 171 Mich App 538, 543-544; 431 NW2d 232 (1988). However, plaintiffs do not cite any authority for the proposition that the trial court lacked the authority to revisit its original decision when deciding a postjudgment motion, and plaintiffs do not otherwise explain why the trial court's postjudgment decision is erroneous. "A party may not state their position and then leave it to this Court to search for authority in support of that position." *Badiee v Brighton Area Sch*, 265 Mich App 343, 379; 695 NW2d 521 (2005).

III. CLAIM UNDER MCL 700.1214

A. STANDARD OF REVIEW

Plaintiffs next argue that the trial court erred in rejecting their claim premised on fiduciary self-dealing under the Estates and Protected Individuals Code (EPIC). See MCL 700.1214. We review de novo issues involving the interpretation and application of a statute. *Scholma v Ottawa Co Rd Comm*, 303 Mich App 12, 16; 840 NW2d 186 (2013).

B. ANALYSIS

MCL 700.1214, as in effect during the period at issue, provided:[2]

> Unless the governing instrument expressly authorizes such a transaction or investment, unless authorized by the court, or except as provided in section 4405 of the banking code . . . a fiduciary in the fiduciary's personal capacity shall not engage in a transaction with the estate that the fiduciary represents and shall not invest estate money in a company, corporation, or association with which the fiduciary is affiliated, other than as a bondholder or minority stockholder. A fiduciary in the fiduciary's personal capacity shall not personally derive a profit from the purchase, sale, or transfer of the estate's property. A fiduciary's deposit of money in a bank or trust company, in which the fiduciary is interested as an officer, director, or stockholder, does not constitute a violation of this section.

Plaintiffs argue that Bills was a fiduciary by virtue of her power of attorney, and that this fiduciary status precluded her from self-dealing with Byrne's assets. Plaintiffs contend that the power-of-attorney documents are the "governing instruments" for purposes of this statute, and that those documents did not give Bills the power to make gifts to herself. Bills, however,

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[2] The Legislature amended EPIC in 2009, effective April 1, 2010. See 2009 PA 46. Unless otherwise indicated, all statutory references to EPIC refer to the pre-amendment version.

contends that she did not use her power-of-attorney authority to conduct the disputed transactions, which instead were conducted pursuant to her authority as a joint account holder. Accordingly, Bills argues that the "governing instruments" are the account agreements, which gave her the authority to make withdrawals from the joint accounts. Bills also argues that there was no estate within the meaning of the statute because Byrne had not yet died. The trial court agreed with Bills' position.

MCL 700.1201 provided that EPIC should be "liberally construed and applied to promote its underlying purposes and policies," which included simplifying and clarifying the law concerning "the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals." "Unless displaced by the particular provisions of this act, general principles of law and equity supplement this act's provisions." MCL 700.1203(1). The code also repeatedly refers to the estates of decedents and certain qualified persons and the documents governing those estates. See, e.g., MCL 700.1104(b), (e), (k); MCL 700.1105(a). Moreover, EPIC, by its own terms, plainly applies to a narrow class of persons and instruments:

> Except as otherwise provided in this act, this act applies to all of the following:
>
> (a) The affairs and estate of a decedent, missing individual, or protected individual who is domiciled in this state.
>
> (b) A nonresident's property that is located in this state or property coming into the control of a fiduciary that is subject to the laws of this state.
>
> (c) An incapacitated individual or minor in this state.
>
> (d) Survivorship and related accounts in this state.
>
> (e) A trust subject to administration in this state. [MCL 700.1301.]

As such, EPIC clearly applies only to estates of a decedent, protected individuals, and incapacitated individuals and certain instruments. Accordingly, MCL 700.1214 does not apply generally to all persons who delegate authority to another via a power of attorney or other agency. Here, Bills was not a fiduciary to Byrne's estate and Byrne was never determined to be an incapacitated individual.

Plaintiffs contend that Bills was a fiduciary within the meaning of the EPIC because Byrne delegated authority over his banking transactions to her pursuant to the power of attorney. Plaintiffs contend that this authority triggered EPIC, notwithstanding the evidence that Bills conducted the challenged transactions in her capacity as a joint account holder as well as under the power of attorney. Plaintiffs rely on *In re Cummin Estate*, 267 Mich App 700; 706 NW2d 34 (2005), rev'd in part 474 Mich 117 (2006), in which the decedent granted a power of attorney to his daughter, the respondent. The respondent used the power of attorney to convey the decedent's real property to herself at a time when the decedent was suffering from dementia and was not able to consent to the transaction. *Id.* at 701. The petitioner (the decedent's son and personal representative of the decedent's estate) sued the respondent in probate court for imposition of a constructive trust on the subject property for the benefit of the decedent's estate. *Id.* The probate court concluded that the decedent breached her common-law fiduciary duty to the decedent in conveying the property to herself, and also that the decedent violated EPIC's prohibition of self-dealing while acting as the decedent's fiduciary. *Id.* The issue before this Court was whether the respondent breached her common-law fiduciary duty to the decedent when the decedent had previously consented to the transaction.

This Court concluded that the respondent breached her fiduciary duty to the decedent because the decedent was incapable of understanding the details of the transaction at the time it occurred, and was therefore unable to consent, notwithstanding his previous consent. This Court affirmed the probate court's order of a constructive trust on the basis of common-law breach of fiduciary duty. *Id.* at 705-706. This Court also considered the alternative basis for affirming the probate court, namely whether the respondent's actions constituted self-dealing under EPIC. This Court concluded that because the respondent's transaction occurred before EPIC became effective, the probate court erred in concluding that EPIC precluded the respondent's act of self-dealing. *Id.* at 706-707. This Court indicated that analyzing the issue was necessary because the probate court misapplied the law-of-the case doctrine when it concluded that EPIC applied. *Id.* at 706-707.

The respondent applied for leave to appeal to our Supreme Court, which reversed the probate court's imposition of a constructive trust on the ground that the decedent consented to the transaction with sufficient knowledge of the details of the transaction. *In re Estate of Cummin*, 474 Mich 1117; 712 NW2d 447 (2006). The Court agreed that EPIC did not apply because the respondent had an accrued right to the property before EPIC became effective. *Id.* at 1117-1118.

Both this Court and our Supreme Court recognized in *In re Cummin Estate* that the substance of EPIC applied to a fiduciary self-dealing in the principal's assets, regardless of the principal's consent, because the principal was impaired by dementia. This case is distinguishable because here plaintiffs failed to offer sufficient proof that Byrne lacked the mental competence to understand the transactions at issue. Accordingly, the trial court properly rejected plaintiffs' claim under MCL 700.1214.

IV. DISINHERITANCE

Plaintiffs argue that Bills' defense to their lawsuit triggered the forfeiture provision in Byrne's trust. Under MCL 700.2518, a provision in a will "purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Similarly, MCL 700.3905 provides that "a provision in a will purporting to penalize an interested person for contesting the will or instituting another proceeding relating to the estate shall not be given effect if probable cause exists for instituting a proceeding contesting the will or another proceeding relating to the estate." Finally, under MCL 700.7113, which became effective April 1, 2010, a provision "in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust."

Here, assuming that Bills decision to defend against plaintiffs' claims triggered the penalty provisions, it is plain that she had probable cause to do so. "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." *In re Estate of Stan*, 301 Mich App 435, 445; 839 NW2d 498 (2013) (citation and internal quotation marks omitted). Bills' status as a joint account holder of the bank and brokerage accounts, Prekel's knowledge that Bills intended to purchase a condominium in the Troy development, and Bills' limited involvement with Aston Travel established probable cause for her defense. Accordingly, the trial court did not err when it concluded that the penalty provision was not enforceable against Bills.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood